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Abstract

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KEYWORDS: Videotaping, Copyright, Sony Corporation

Is Home Videotaping A Fair Use of Copyrighted Programs? *Universal City Studios, Inc. v. Sony Corporation of America*

On October 19, 1981, the United States Court of Appeals for the Ninth Circuit held that private in-home television videotaping infringes upon copyrights.[1] The court concluded that an implied video recording exemption to the Copyright Act of 1976 did not exist and that noncommercial home videotaping of copyrighted programs is not fair use of the material.[2] This decision reversed the lower court's dismissal of the suit and the court remanded the case in order to fashion relief for Universal City Studios and Walt Disney Productions. The result inspired the introduction of identical bills S. 1758 and H.R. 4808,[3] designed to eliminate home videotaping liability. Subsequently, a compromise measure was introduced which would make home videotaping legal but would call for a surcharge to be added to the cost of video recorders and blank tapes.[4] However, due to the widespread availability and acceptance of videotape equipment for home use, Congress may respond to public pressure by amending the Copyright Act of 1976.[5] Based upon existing law, the home videotaper's liability can only be absolved by an

1. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981) [hereinafter cited as *Sony II*].

2. *Id.* at 977.

3. H.R. 4808, 97th Cong., 1st Sess. (1981) is identical in its language to S. 1758, 97th Cong., 2d Sess. (1982). Both proposals seek to amend chapter 1 of title 17 U.S.C. to read as follows:

> § 119. Limitations on exclusive rights: Exemption for certain video recordings:
>
> Notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if—
>
> (1) the recording is made for private use; and
>
> (2) the recording is not used in a commercial nature.

4. H.R. 5705, 97th Cong., 2d Sess. (1982).

5. The Copyright Act of 1976 was codified in title 17 of the United States Code.

act of Congress since it is outside the judiciary's scope to construe the Copyright Act so as to confer an exemption.[6] Should Congress enact an exemption for home video recording, it is probable that it would closely resemble the existing home sound recording exemption.[7]

This comment provides a critical evaluation of the basis for copyright protection and application of the fair use defense to a charge of copyright infringement.[8] The results of the analysis suggest that the Ninth Circuit in *Universal City Studios v. Sony Corp. of America*[9] correctly decided under current copyright law, that home videotaping is an infringement. This decision protects the copyright holders' property rights and ensures an economic incentive for creativity in the arts and sciences.

The *Sony* Case

The controversy is caused by the availability of new technology to the public. Sony Corporation manufactures and markets the Betamax tape deck which has the capacity to record television broadcasts on videotape in the home. Universal City Studios, Inc., and Walt Disney Productions[10] brought suit against the Betamax manufacturer-distribu-

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6. *See* Note, *Universal City Studios, Inc. v. Sony Corp.; 'Fair Use' Looks Different on Videotape,* 66 VA. L. REV. 1005 (1980).

7. Congress, in 1971 amended title 17 of the United States Code [17 U.S.C.A. § 1(f) (1971)], to provide for the creation of a limited copyright in sound recording. . . . However, [in H.R. Rep. No. 92-487, 92d Cong., 1st Sess. (1971), Congress made it clear that] this limited copyright was not intended to interfere with home recording: '[s]pecifically, it was not the intention of the Committee to restrain home recording . . . where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.'

Note, *Copyright and the Home Video Recording Controversy,* 81 W. VA. L. REV. 231, 245 (1979) (footnotes omitted).

8. Barkan, *Universal v. Sony: Is Home Use in Fact Fair Use?,* 3 COM. ENT. L.J. 53 (1980).

9. *Sony II,* 659 F.2d 953 (9th Cir. 1981).

10. Plaintiffs will hereinafter be referred to as Universal. It should be noted that the Motion Picture Association of America has joined the original plaintiffs. In addition Attorneys General from Alaska, Iowa, Minnesota, Mississippi, Montana, North Carolina, Ohio, Oklahoma, Vermont and Wisconsin have filed amicus briefs in the United States Supreme Court in support of defendants' position.

tor,[11] advertising agency,[12] four retail stores,[13] and one consumer[14] charging copyright infringement of programming transmitted over public airways and freely received by the public.[15]

The studios claimed protection under the Copyright Act[16] and demanded compensation. Plaintiffs argued that defendants were primarily responsible for the infringment since they produced and sold the Betamax, a device capable of taping their television programs.

At the trial level,[17] three years passed before District Judge Ferguson dismissed the suit and ruled the studios had not met the burden of proving harm suffered. The court held that in-home videotaping was a fair use of copyrighted material and thus not an infringement upon copyrights as held by the studios. Moreover, the court held the Copyright Act of 1976 contained an implied home video-recording exemption. Thus, the corporate defendants were victorious on all counts. To fully appreciate the trial court's ruling, it is necessary to become familiar with the purview of the copyright statutes and the cases interpreting their language.

Source of Copyright Protection

The Constitution granted Congress the power to enact copyright laws "[t]o promote the progress of science and useful arts, by securing, for limited times, to authors . . . the exclusive right to their . . . writings."[18] Congress exercised this power by passing the Copyright Acts of 1909 and 1976.[19] Copyright owners were granted various exclusive rights, subject to limiting provisions codified in the Act.[20] Motion pic-

11. Sony Corporation of America.
12. Doyle Dane Bernback, Inc.
13. Carter Hawley Hale Stores, Henry's Camera Corp., Associated Dry Goods Corporation and Federated Department Stores, Inc.
14. William Griffiths was later dropped from the suit.
15. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 443 (C.D. Cal. 1979) [hereinafter cited as *Sony I*].
16. Copyright Act of 1976, 17 U.S.C. § 107 (1976).
17. *Sony I*, 480 F. Supp. at 469.
18. U.S. CONST. art. I, § 8, cl. 8.
19. Copyright Act of 1909, 35 Stat. 1075 (1909); Copyright Act of 1976, 90 Stat. 2541 (1976).
20. Subject to sections 107 through 118, . . . the owner of copyrights

tures are listed as copyrightable property through the Townsend Amendment to the 1909 Act, passed in 1912,[21] and are now listed in section 102(a)(6) which sets forth the general subject matter of the 1976 Act.[22]

Statutory Exemptions to Copyright Restrictions

Should the Home Sound Recording Exemption be Extended to Video Recording?

The Sony trial court[23] ruled that although, "[t]he broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works . . . legislative history does not show this intent."[24] The court then characterized its task as a search for specific congressional intent to protect copyright holders from video recording.[25]

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under this title . . . has the exclusive right to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion picture and other audiovisual works to perform the copyrighted works publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1976).

21. The text of the Townsend Amendment was codified in the 1909 Copyright Act at § 5 thereby making motion pictures copyrightable property.
22. 17 U.S.C. § 102(a)(6) (1976).
23. *Sony I*, 480 F. Supp. 429.
24. *Id.* at 443.
25. *Id.*

In 1971 Congress limited the Copyright Act to provide an exception for home sound recording of copyright materials, provided it was done for private use.[26] The revision committee explained that its intention was not "to restrain the home recording . . . where [it was] for private use and with no purpose of reproducing or otherwise capitalizing commercially on it."[27] The committee concluded that although private home sound recordings was common and unrestrained, it did not pose a serious threat to producers and performers. The rationale was based on the belief that modern day copyright holders would be in a position no different from those who owned copyrights in musical works over the past two decades.[28]

The trial court in *Sony* determined the language of section 106 of the Copyright Act was not to be strictly construed in every instance. Sony had argued that Congress did not intend to restrict any form of home taping, since unrestricted taping of phonograph records had previously been exempted in 17 U.S.C. § 107 (1976). The court recognized, however, the special treatment afforded sound recordings and construed similar legislative intent for an implied video recording exemption.[29] The court based its opinion, in part, on the premise that a video recording exemption was implicit in the 1976 revision.[30]

A contrary result was reached by the appellate court in *Sony*[31] which focused on whether Congress "intended" to withdraw copyright protection from broadcasted programs. Specifically their concern was "whether Congress ha[d] exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107-118."[32] The court found the statute to be unambiguous and consequently found the grant of exclusive rights to be limited only by explicit statutory exceptions. The *Sony* court stated that "absent a clear direction from Congress, [the court should not] disrupt this [statutory] framework by carving out exceptions to the broad grant of rights apart from those in the stat-

26. H.R. Rep. No. 487, 92d Cong., 1st Sess. (1971).
27. *Id.* at 1572.
28. *Id.*
29. *Sony I,* 480 F. Supp. 429.
30. *Id.* at 443.
31. *Sony II,* 659 F.2d 963.
32. *Id.* at 966.

ute itself."[33] This holding was diametrically opposed to the trial court's willingness to consider and analogize video recording to the treatment of in-home sound recording. Since the statute was deemed clear and unambiguous by the appellate court, "it would be highly improper to construe inconclusive legislative history so as to apply a statute in a manner inconsistent with its claimed meaning."[34]

Obviously, limited copyright protection for sound recordings does not mandate a finding of Congressional intent to afford the same treatment to audiovisual recordings.[35] A major motivation for the special Congressional treatment of sound recording is that, home recording "is common and unrestrained today."[36] The underlying rationale seems to be, "[y]ou simply cannot control it."[37] Conversely, audiovisual tape technology is less available to the average consumer because of cost. There also exists potential means of controlling video taping by electronic interference or by control of tape availability. Consider also that limitations on availability of sound recording cassettes for home taping would interfere with independent beneficial uses of soundrecording, such as dictation and private notes. On the other hand, the dominant use of the Betamax and audiovisual tapes is to record television material. Therefore, limitations on the acquisition of tapes would deter the copying without disrupting independent beneficial uses.[38]

A distinction also exists between the effect of sound recording and audiovisual recording on the audience. Where a viewer usually will only view a videotape a limited number of times, a listener's playing of a sound recording could entice him to purchase the record.[39] This factor, although of questionable significance, was considered by the appellate court to bolster its holding that the statute is unambiguous and in-home video taping for private noncommercial use constitutes an in-

33. *Id.*

34. *Id.* at 968-69 (citing United States v. Wilson, 591 F.2d 546 (9th Cir. 1979)).

35. Id. at 966-67.

36. H.R. Rep. No. 487, *supra* note 26, at 1572.

37. *Sony I,* 480 F. Supp. at 445 (quoting from the statement of Asst. Register of Copyrights, Barbara Ringer before *Subcomm.* No. 3 *of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 22 (June 9-10, 1971)).

38. Marsh, *Betamax and Fair Use: A Shotgun Marriage,* 21 SANTA CLARA L. REV. 49, 63 (1981).

39. *Id.* at 65.

fringement on copyrighted material.[40]

Fair Use

The copyright holder possesses a near monopoly over the use of his works, however, in certain situations the rights of the copyright holder are subordinated to the public good. "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."[41]

"Copyright itself has been called 'the metaphysics of law'[42] and fair use is one of the more elusive concepts embodied in that [area]."[43] To balance the conflicting desires of the public in unrestricted use with the copyright holder in retaining control, courts have created the fair use doctrine. The doctrine previously advanced in *Williams & Wilkins Co. v. United States,*[44] and later codified in section 107 of the Copyright Act, creates exemptions to an author's monopoly thereby allowing public access to the work.[45]

Despite codification, the meaning of fair use remains amorphous. This is because fair use is an equitable doctrine and its flexible nature defies concrete definition.[46] For practical purposes, however, fair use has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."[47]

To apply the fair use analysis, courts examine four factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon

40. *Sony II,* 659 F.2d 963.

41. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1931).

42. Barkan, *supra* note 8, at 60 n.42 (quoting Story, J., in Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C. Mass. 1841)).

43. *Id.* at 60.

44. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd mem.*, 420 U.S. 276 (1975).

45. Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968).

46. Rosemont Enter., Inc. v. Random House, Inc., 336 F.2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

47. *Id.* at 307.

the potential market for or value of the copyrighted work."[48]

(1) Purpose and Character of Use:

A first step in fair use analysis requires a determination of whether the purpose and character of the use "is of a commercial nature or is for nonprofit educational purposes."[49] It has been held that use of copyrighted matter for purposes of science, research,[50] education and criticism[51] constitutes fair use.

The trial court in *Sony* pointed out that the taping of home video programs was private and noncommercial. The studio had chosen to broadcast their programs over public airways and all that resulted from the videotaping was increased access to the programs.[52] For example, the home videotaping could result in increased use by those whose viewing was curtailed by work schedules or counter programming. The court determined that enforcement of the copyrights would be intrusive on private rights, virtually impossible to administer and unwarranted "where the plaintiffs themselves chose to beam their programs into the homes."[53]

The *Sony* appellate court, however, considered copying video entertainment a convenience and convenience does not translate into a non-profit educational purpose, as required by section 107. Thus, "[t]he fact that the use involved does not further a traditionally accepted purpose clearly weighs against a finding of fair use."[54]

(2) The Nature of The Work:

There is an absence of extensive analysis in case law and legislative history regarding the second criteria, "the nature of the copyrighted work."[55] The inquiry should center on whether the nature of the work was such that "distribution would serve the public interest in

48. *Williams & Wilkins Co.*, 487 F.2d at 1352 (codified in 17 U.S.C. § 107 (1976)).

49. 17 U.S.C. § 107(1) (Supp. IV 1980).

50. *Williams & Wilkins Co.*, 487 F.2d at 1354.

51. Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376, 384 (D. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976).

52. *Sony I*, 480 F. Supp. at 454.

53. *Id.*

54. *Sony II*, 659 F.2d at 972.

55. 17 U.S.C. § 107(2) (Supp. IV 1980).

the free dissemination of information."[56]

The *Sony* trial court refused to characterize the copyrighted material at issue as scientific or educational. Moreover, the court was hesitant to label the works solely as entertainment because, "the line between transmission of ideas and mere entertainment is much too elusive."[57] Therefore, at the trial level, the minimal informational aspect of the programs was deemed sufficient to meet the fair use test.

To determine the nature of the work the trial court even considered whether the studios' distribution system provided free dissemination of information. It is significant to note that a finding of commercialism arguably would point toward a finding of entertainment, rather than information. While viewers of commercial television do not pay directly for the programming which they view, the copyright holders (Universal and Disney) are paid for the material by the broadcasters who earn profits by selling advertising time. The studios argued that this constant infusion of funds subsidized their business. Thus, "[t]he direct payment from broadcasters and advertisers has made the 'free' offering to the public very profitable for the plaintiffs."[58] However, as this case only involved copyrighted material which the plaintiffs had voluntarily chosen to telecast free of direct charge to the public, the work was deemed noncommercial by the trial court.[59] Nevertheless, the trial court's detailed discussion of plaintiffs' method of business operations was discounted by the appellate bench. While the appellate court determined that business arrangements could be considered in calculating damages, it decided that they are not indicative of *nature of the work.*[60]

Case law indicates that the scope of fair use is narrower for entertainment material than informational works.[61] In a mass copying case, *Rohauer v. Killian Shows, Inc.,*[62] the court did not find "public interest in the dissemination of 'The Son of the Sheik' sufficient to jus-

56. *Rosemont Enter., Inc.,* 336 F.2d at 303.
57. Stanley v. Georgia, 344 U.S. 557, 566 (1969).
58. *Sony I,* 480 F. Supp. at 453.
59. *Id.*
60. *Sony II,* 659 F.2d at 972.
61. *Id.*
62. 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd on other grounds,* 551 F.2d 484 (2d Cir. 1977), *cert. denied,* 431 U.S. 949 (1977).

tify the infringement. . . . [The court stated]: It can scarcely be argued here that the enduring fame of Rudolph Valentino or intrinsic literary and historic merit of the 'Son of the Sheik' . . . serves any public interests."[63] The fictional works which were the subject of the suit were entertainment, and absent "productive use" mass copying of entertainment will not constitute a fair use.

(3) Scope of the Copy in Relation to the Original Work:

The third factor involved in fair use analysis is "the amount and substantiality of the portions used in relation to the whole of the material."[64] The general rule is the more substantial the taking, the less likely the fair use defense will succeed. The scope of the taking obviously influences the effect the copy has on the market. Thus the scope factor intertwines with the harm factor producing a market effect on the original which can be determinative.[65]

In *Leon v. Pacific Telephone & Telegraph Co.*,[66] the court commented, "[c]ounsel have not disclosed a single authority . . . which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use."[67] When *Leon* was decided in 1937, the technology of the era had little impact on copyright law. However, difficulties caused by scientific progress have forced reevaluation of the copyright laws. For example, the trial court in *Sony* recognized that home videotaping usually involved copying the entire original, depriving copyright holders of control and the "intellectual property"[68] of its uniqueness. The court, however, concluded such copying caused no reduction in the market for the original work.[69] Thus, the *Sony* trial court evaluated all four fair use factors, determined that the whole copying did not reduce the value of the original work, and deemed the copying a "fair use".

Assuming the *Sony* trial court's ruling on the market effect of

63. *Rohauer*, 379 F. Supp. at 733.

64. *Williams & Wilkins Co.*, 487 F.2d at 1352.

65. M. NIMMER, NIMMER ON COPYRIGHTS § 13.05(D) (1982). For a discussion of the "harm factor" see *infra* p. 673.

66. 91 F.2d 485 (9th Cir. 1937).

67. *Id.* at 486.

68. "Intellectual property" is a term of art; it encompasses work traditionally considered art as well as copyrighted and patented material.

69. *Sony I*, 480 F. Supp. at 454.

videotape copying was correct, "[t]he mere absence of competition or injurious effect upon the copyrighted work will not [necessarily] make a use fair."[70] It has been argued that absent compelling reason to the contrary, equity should render the appropriation of a copyright holder's work without consent, impermissable. However, the mere fact one desires to copy a program for his own viewing convenience should not rise to the concerned level of appropriation. Millions of private homeowners record television programs for their own private use. Modern opinion appears to be that government (and the judiciary) should impose less regulations on individuals. Despite this wave of sentiment, courts have viewed the fact that the entire work is copied against the videotaper (and the manufacturer as a contributory infringer). Thus, the scope of the copy factor "in the fair use calculus weighs heavily in [the copyright holder's] favor."[71]

(4) The Harm Factor:

The fourth factor in fair use analysis, "the effect of the use upon the potential market for . . . the copyrighted work"[72] weaves into the fabric of the other three. Although the traditional approach to fair use considers all four factors, it emphasizes the harmful impact upon the value of the copyrighted work.[73]

When considering whether home recording would cause harm to the market for copyrighted works,[74] the *Sony* trial court evaluated future detrimental effects on the potential market for the work caused by the technological advances rather than assessing the copyright holder's actual economic harm.[75] The studios believed the focus should have been a determination of their property rights. The companies had payed to have writers and artists create the material, thus there was no reason for further proof of harm.

Nevertheless, Universal and Sony argued additional potential harm based on a belief that videorecording would reduce the audience

70. Loew's, Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 184 (S.D. Cal. 1955).

71. *Sony II,* 659 F.2d at 973.

72. 17 U.S.C. § 107(4) (Supp. IV 1980).

73. M. NIMMER, *supra* note 65, at § 13.05.

74. *Sony I,* 480 F. Supp. at 451-52, 466.

75. Comment, *All's Fair in Love and Private Video Recording—The Copyright Infringement Issues in the Sony Case,* 30 CATH. U.L. REV. 621, 625 (1981).

pool for original and repeat broadcasts. This belief was premised upon the proposition that home video libraries made home videotapers a less likely audience for television reruns and rereleased movies. Reduction in audience size would result in a decrease of broadcaster fees earned through the sale of advertising time. Furthermore, the revenue loss would precipitate lower royalties paid to the copyright owners.[76]

The claim was also made that "time shifting", taping a program for later viewing, hurts the sale of commercial time because sponsors realize viewers now have editing capacity. Essentially, the studios sought preservation of their market share and business practices from the threat of technology. Consequently, the trial court in *Sony* was forced to evaluate whether the fair use doctrine was relevant when copyright protection was tested by the non-commercial use of new technology. For guidance the court utilized the approach of *Williams & Wilkins Co. v. United States.*[77]

In *Williams,* the National Institute of Health (N.I.H.) and the National Library of Medicine (N.L.M.) photocopied entire articles from plaintiff's medical journals and made copies available to library users. The copying was extensive, reaching approximately 93,000 copies per year.[78] The publisher of the medical journals claimed that if readers could obtain an article from N.I.H. or N.L.M., subscriptions would decrease and they would not be reimbursed for the use of the copyrighted material.

In resolving the dispute the *Williams* court utilized the traditional fair use factors in addition to other relevant considerations. The key factors in the court's consideration was whether medical research would be harmed if copying was prohibited. The N.I.H. and N.L.M. motivation apparently was to make journal articles available to promote scientific progress. Both agencies made efforts to limit the distribution of articles to scientific personnel whose research would be impeded if fair use was inapplicable. The court found no substantial injury to the copyright holder. The copyright holder's claim that it is or will be substantially harmed was balanced against the risk of harm to

76. Marsh, *supra* note 38, at 75.
77. 487 F.2d 1345.
78. *Id.* at 1348.

science; the court concluded that the copying was fair use.[79] The language of the opinion was not forceful and merely stated that the problem of balancing the interests of science with the publisher's property rights called for legislative guidance.[80] The court demonstrated this by confining the finding of fair use to the period prior to Congressional action.

Obviously there was disagreement between the *Sony* trial court and the appellate court over *Williams'* persuasiveness. The trial court found *Williams* value to be a "demonstration of the relevance of the fair use doctrine . . . when a copyright protection is tested by new technology and noncommercial use."[81] Conversely, the appellate court felt that *Williams,* "straine[d] fair use beyond recognition and undermine[d] our traditional reliance on the economic incentives provided to authors by the copyright scheme."[82] The real value of *Williams* lies in its plea for Congressional action highlighting the inadequacy of copyright law as a means of resolving disputes born of technological advances. Furthermore, new technology cases pose difficult damage questions because the ramifications of the advances often are not understood. Thus, courts can only guess as to the potential harm.[83]

The *Sony* trial court was "hesitant to identify, the probable effects of home-use copying."[84] As in *Williams,* the plaintiff's allegation of injury was found to be without merit. Reasons for this reluctance can be found in the evolving marketing system and the numerous speculative assumptions upon which a finding of harm must be based.[85] However, "[t]he central question in the determination of fair use is whether the infringing works tend to diminish or prejudice the potential sale of the plaintiff's work."[86] Home videotapers obviously use copies for the same purpose as the original. Thus, taping decreases the economic value of

79. *Id.* at 1354.
80. *Id.*
81. *Sony I,* 480 F. Supp. at 450.
82. *Sony II,* 659 F.2d at 970.
83. Calculation of damages and thorough discussion of potential remedies is beyond the scope of this article.
84. *Sony I,* 480 F. Supp. at 452.
85. *Id.*
86. *Sony II,* 659 F.2d at 974 (quoting M. NIMMER, *supra* note 65, at § 13.05(E)(4)(c)).

the work. Similarly, a strong correlation probably can be found between the decrease in record album sales and the increase in blank cassette sales.[87]

Sony argued the harm had not occurred and there is no proof it would. The movie studios often sell their products three times, (1) to theaters, (2) as a videotape, and (3) to television networks under a royalty agreement. Thus, movie studios are compensated before home videotapes can be made. Despite Sony's argument the appellate court remanded the case to the trial level to calculate damages. In copyright infringement cases a showing of potential damages is sufficient to support a judgment for the copyright holder and the copyright act provides minimum damages when actual damages cannot be proven.[88]

The studios eventually succeeded in fixing liability on Sony Corporation, Sony Corporation of America, Doyle Dane Bernback, Inc., and the retail stores for the copyright infringement by the videotape recorder owners based on the theory of contributory infringement. Under this theory, one is guilty of contributory infringement if he, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[89] Clearly, the corporate defendants knew and encouraged the copying of copyright works from television broadcasts. Indeed the primary selling point of the Betamax product and its primary use is to reproduce television programs. Thus, combining the knowledge element with the criteria for infringement, "[t]he corporate [defendants] are sufficiently engaged in the enterprise to be held accountable."[90]

The Supreme Court recently agreed to review the decision by the Ninth Circuit that home videotaping of television programming constitutes a violation of federal copyright law.[91] Attorneys General from twelve states have filed amici curiae petitions to challenge the appellate ruling. The thrust of their novel theory is that "[t]elevision is no longer a luxury; it has become a necessity . . . and accessibility to the full range of television programming is an essential component of the well

87. *Id.*

88. 17 U.S.C. § 504(c) (1976).

89. Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

90. *Sony II*, 659 F.2d at 976.

91. 50 U.S.L.W. 3982 (U.S. June 14, 1982).

rounded citizen."[92] Therefore, since Betamax allows increased access it contributes to public welfare.

The Supreme Court should not accept this approach because the concept of fair use is grounded in the dissemination of knowledge and progress in the arts and sciences, rather than entertainment. To deal with this case the Court should either defer to the legislature or affirm the appellate courts unpopular application of the law.

Conclusion

The Courts are required to deal solely with the construction and constitutionality of statutes, not their wisdom. It seems evident that the continuing evolution of technology will strain archaic copyright law. The Supreme Court is faced with the unenviable task of steering between Scylla and Charybdis. The Scylla of enforcing a clear copyright statute which fails to anticipate the emergence of mass video reproduction capabilities and the Charybdis of judicially encroaching upon the legislative branch by liberally interpreting a statutory exception where one does not exist. Congress should act to make a distinction between commercially motivated recording and in-home videotaping. This will relieve the court of an obligation to make an unpopular decision under the present copyright act.

Howard S. Toland

92. Miami Herald, May 9, 1982, at A6, col. 1 (referring to Missouri Attorney General John Ashcroft's friend-of-the-court petition).